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No. 07-72

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IN THE

Supreme Court of the United States

ARTIN H. COLOIAN,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

The courts of appeals are split 5-4 on the question presented here—whether a federal court has the power to expunge its own records. The petition showed (at 8-16) that this split is not only deep, but also that it is an important and recurring one: There are more than fifty federal cases in the last ten years alone that have reached divergent answers on this threshold jurisdictional question.

The petition also showed (at 16-21) that, for twenty years before this Court decided *Kokkonen v. Guardian Life Insurance Co. of America*, 511 U.S. 375 (1994), federal courts had uniformly ruled that they had jurisdiction to expunge their own records of criminal proceedings. Since *Kokkonen*, several courts of appeals—including the First Circuit below—have ruled that federal courts do not have this power over their own records. But, as the petition showed, *Kokkonen* did not address the question presented here. It addressed only whether, in the absence of a clause preserving jurisdiction, a federal court has jurisdiction to enforce a settlement agreement merely because it had jurisdiction over the underlying case. It did not address jurisdiction to correct or expunge a court's own records or the ancillary jurisdiction of the federal courts in criminal matters. Thus, the court of appeals below, and the others that are in the minority of the split on the question presented here, have misapplied the principles set out in *Kokkonen* in support of an erroneous rule denying the federal courts' long-recognized jurisdiction over their own records of criminal proceedings.

The Government does not contest either the existence of this circuit split or the importance and recurring nature of the question presented by Mr. Coloian's petition. Nor does the Government mount any serious argument that the courts in the minority of the split have correctly applied *Kokkonen*.

Nonetheless, the Government contends that this Court's review is not warranted. Its primary argument (Opp. 5-8) is

that this case is "an unsuitable vehicle" for resolution of the question presented because, in its view, the petition has limited the question to authority to expunge *judicial* records whereas the proceedings below also involved a request to expunge records of the *executive branch*. That argument is based on a plainly incorrect characterization of the record. Petitioner's motion in the trial court sought expungement only of judicial records, as was recognized by all the parties to the trial court proceedings as well as by the court of appeals. This supposed vehicle problem simply does not exist.

The Government's other arguments—that the decision below is part of a recent "trend" in the law that does not warrant this Court's review, and that Mr. Coloian's claims fail on the merits—are equally unpersuasive. As the Government concedes, the trend in the law it cites is not uniform. And, as shown in the petition, the courts on the minority side of the split, including the court of appeals below, have misapplied this Court's decision in *Kokkonen*, a decision that, in all events, did not address the question presented here. The Government also cannot dispute that there is a 5-4 split on the question presented, and, because courts continue to disagree on this issue even after *Kokkonen*, there is no indication that the split will be resolved without this Court's intervention. Further, the Government's arguments about the merits of Mr. Coloian's claims fail to recognize that the question presented to this Court is not whether Mr. Coloian's motion to expunge should have been granted, but whether the courts below had the jurisdiction to even entertain it. Mr. Coloian has made a strong argument that the district court applied an erroneous legal standard to his claims for expungement, and the court of appeals should address that argument on the merits.

In short, the Government's opposition suggests no serious basis for denying review.

I. THE GOVERNMENT'S PRIMARY ARGUMENT THAT PETITIONER'S CLAIMS SEEK EXPUNGEMENT OF EXECUTIVE RECORDS IS PLAINLY INCORRECT

The Government's primary argument in opposition to certiorari is that this case is an "unsuitable vehicle" to resolve the question whether a federal court has jurisdiction to expunge its own records. Opp. 5-8. According to the Government, petitioner's request below was "not limited to records in the custody of the Judicial Branch" and the underlying harms at issue differ depending on whether a court is asked to expunge judicial records or executive records. As an initial matter, the Government acknowledges that Mr. Coloian is seeking to expunge judicial records and so there is no question that, as to that request, there is a clear issue regarding whether the district court had jurisdiction to expunge its records of Mr. Coloian's case. More significantly, the Government's principal argument in opposition is also based on a plain mischaracterization of the record in this case.

Mr. Coloian's motion was to expunge "his record in the above case." Pet. App. 59a. And, indeed, in the district court, all parties and the court recognized that Mr. Coloian's motion applied to only judicial records. The Government stated that it understood Mr. Coloian's motion to expunge his "record in the above entitled matter" to relate to "*all judicial records* connected to the case, including the indictment, pleadings, exhibits, and transcripts of public court proceedings." Pet. App. 68a & n.1 (emphasis added). The Government's counsel confirmed at oral argument, "I'm presuming that we're here on the judicial records kept by this Court." Pet. App. 30a. And counsel further characterized Mr. Coloian's request as one to "destroy your [the district court's] records and send them down the memory hole." Pet. App. 32a. Likewise, in his brief remarks at oral argument Mr. Coloian's counsel indicated that he was seeking expungement of judicial records, for example, by relying on

the Seventh Circuit's decision in *United States v. Flowers*, 389 F.3d 737, 738 (7th Cir. 2004), for the proposition that "in order to preserve *judicial records* for the purpose of sentencing and sentencing guidelines, there's a need to control those records and have them present when someone is to be sentenced." Pet. App. 29a (emphasis added).

The district court plainly understood that Mr. Coloian's motion sought to expunge only his judicial records. The court never ruled or even suggested that it had jurisdiction to expunge records kept by the Executive Branch or that there was any reason to reach that issue. Indeed, when it framed the issue posed by Mr. Coloian's motion, the district court noted that there appeared to be an unresolved question as to whether a federal district court has jurisdiction to expunge its own records. *See* Pet. App. 32a ("There is nothing that I'm aware of or that counsel have called to my attention that either expressly authorizes or prohibits a court from expunging the records of proceedings before it."). The court then ruled that federal courts do have jurisdiction to expunge judicial records, reasoning "that courts do have inherent authority and inherent control over *their records* and can, in appropriate circumstances, expunge records." Pet. App. 32a-33a (emphasis added).

On appeal, the First Circuit also understood the issue before it as whether a federal district court has jurisdiction to expunge judicial records. The First Circuit recounted and then reviewed the district court's ruling that it had jurisdiction over its own records. Pet. App. 3a ("[T]he district court first concluded that 'courts do have inherent authority and inherent control over *their* records and can, in appropriate circumstances, expunge records, but that power should be sparingly exercised.'") (emphasis added). And, in discussing the circuit split on this issue, the Court included the Seventh Circuit among those courts of appeals that have "concluded that district courts do have ancillary jurisdiction to expunge records based on equitable considerations," Pet. App. 8a, without noting that the Seventh Circuit has

distinguished between a court's jurisdiction to expunge executive records and judicial records and has held that a federal court has jurisdiction to expunge only judicial records. *See Flowers*, 389 F.3d at 738 ("[W]e have previously made clear that federal courts lack jurisdiction to order expungement of such records [maintained by the executive branch].").

The Government, too, noted in its appellate brief that the Seventh Circuit's decision in *Flowers* had "expressly found ancillary jurisdiction or inherent authority to order expungement based on equitable considerations," without then noting the Seventh Circuit's distinction between judicial and executive records. Pet. App. 49a. In its briefing to the First Circuit, the Government expressed confusion, for the first time by any party, as to whether Mr. Coloian's application reached executive records. Pet. App. 51a.

The Government's misunderstanding apparently stems from Mr. Coloian's counsel's discussion at oral argument before the district court of 28 U.S.C. § 534, which provides the Attorney General with authority to collect and disseminate criminal records. *See* Opp. 6; Pet. App. 27a (colloquy at oral argument concerning this statute). But, in that exchange, Mr. Coloian's counsel was not asking the court to expunge records in the Attorney General's possession. Rather, counsel argued that if Mr. Coloian's judicial records were not expunged, *those* records would ultimately be disseminated by the Attorney General to Mr. Coloian's detriment. *See* Pet. App. 27a.

Indeed, there would be no need for Mr. Coloian to invoke the ancillary jurisdiction or inherent powers of the Court to seek to correct records in the Attorney General's possession. As the Government points out (Opp. 7), under the Administrative Procedure Act there is a private right of action to correct inaccurate executive branch records. *See, e.g., Tarlton v. Saxbe*, 507 F.2d 1116, 1134 n.5 (D.C. Cir. 1974). Mr. Coloian's motion sought to correct only his

judicial records. If that motion were granted, and if the Executive Branch did not fulfill its obligation to correct the records in its possession, Mr. Coloian plainly would have a statutory remedy to seek such correction.

The Government has thus manufactured a completely illusory vehicle problem in this case. The Government's counsel in the district court, Mr. Coloian, the district court, and the First Circuit all understood Mr. Coloian's motion to request expungement only of the district court's own records of Mr. Coloian's criminal proceedings. The question whether a district court has jurisdiction to expunge its own records is squarely presented here.

II. THE GOVERNMENT DOES NOT DENY THAT THERE IS A 5-4 CIRCUIT SPLIT AS TO THE IMPORTANT AND RECURRING JURISDICTIONAL QUESTION WHETHER A FEDERAL COURT HAS THE POWER TO EXPUNGE ITS OWN RECORDS

The Government does not contest that there is a 5-4 circuit split on the question presented. Nor does the Government contest that the question presented is an important and recurring one which, as Mr. Coloian set forth in his petition, has been raised and decided in a non-uniform manner by more than fifty reported decisions in the federal courts during the past ten years. Pet. 13 & n.2. The Government also acknowledges that the decision below conflicts with a recent decision by the Seventh Circuit holding that a federal court *does* have jurisdiction to expunge judicial records. Opp. 8.

The Government's sole argument (Opp. 8-9) as to why this deep circuit split, on an important and recurring issue, does not warrant review by this Court is that there is a "trend in the circuits" since this Court's decision in *Kokkonen* to rule that federal courts do not have jurisdiction to expunge their own records. The Court's decision in *Kokkonen*, however, did not purport to address the application of

ancillary jurisdiction over a court's own records. Nor did the Court sweep any broader than answering the question before it in that case: whether a district court has "inherent power" to enforce a settlement agreement merely because it had jurisdiction over the underlying case. The Court did invoke general principles of ancillary jurisdiction, but noted in doing so that "[t]he doctrine of ancillary jurisdiction can hardly be criticized for being overly rigid or precise." 511 U.S. at 379.

While *Kokkonen* answered the question presented in that case, the courts have continued to note outside that context that the doctrine of ancillary jurisdiction is "not easily defined" and "not well settled" and, indeed, that it is not even clear whether it should apply at all in the context of a criminal proceeding. *Stein v. KPMG, LLP*, 486 F.3d 753, 760 (2d Cir. 2007); *Garcia v. Teitler*, 443 F.3d 202, 208 (2d Cir. 2006) ("The boundaries of ancillary jurisdiction are not easily defined and the cases addressing it are hardly a model of clarity."). The Government notes that the Seventh Circuit's jurisdictional holding in *Flowers* was based on "pre-*Kokkonen* circuit precedent" (Opp. 8), but the other courts of appeals on the Seventh Circuit's side of the split each have their own "pre-*Kokkonen* circuit precedent." Indeed, before the Court decided *Kokkonen*, the circuits uniformly held that federal courts had jurisdiction to entertain applications to expunge judicial records. Pet. 8-10. And, if anything, the principles of ancillary jurisdiction set forth in *Kokkonen* favor a jurisdictional rule that is directly contrary to the one followed in the "trend" of cases in the circuits applying *Kokkonen* to motions to expunge judicial records. Pet. 16-21.

In light of the uncertainty surrounding the application of the doctrine of ancillary jurisdiction outside well-established contexts such as contempt proceedings, petitions for attorneys' fees, and, since *Kokkonen*, settlement agreements, the split on the question presented here is not likely to be resolved unless this Court intervenes. The Court should answer the question presented by this deep circuit split and

resolve the confusion in the courts of appeals surrounding the question presented in this case.

III. THE GOVERNMENT'S ARGUMENTS ABOUT THE MERITS OF MR. COLOIAN'S CLAIMS ARE UNPERSUASIVE

Finally, the Government does not adequately respond to the petition's showing (at 16-21) that the court below misapplied *Kokkonen* in holding that federal courts lack jurisdiction to expunge their own records. Instead, the Government focuses (Opp. 9-11) on the *merits* of Mr. Coloian's request for expungement.

The Government's focus is misplaced. To begin with, the Government's presentation on the merits of Mr. Coloian's claims for expungement fails to recognize that he has set forth a strong argument that the court of appeals applied an erroneous legal rule on the threshold *jurisdictional* question squarely presented by this petition. That is the question the Court would address if it grants the petition, not the fact-bound issues raised by the Government as to whether Mr. Coloian has suffered adequate hardship, harm to his reputation, adverse employment consequences, or any other harm that the courts below may consider in determining whether to expunge judicial records if, as a threshold matter, this Court holds that a federal court has the power to expunge its own records.

In any event, as Mr. Coloian showed below, the district court applied an unduly restrictive legal standard to his claim for expungement. Mr. Coloian was *acquitted* of the charges brought by the Government. His situation is thus unlike many claimants who seek expungement on the basis of equitable factors such as good behavior after criminal convictions. The district court nevertheless disregarded the unfair stigma that has attached to Mr. Coloian, and that will impede his career as a lawyer, as a result of the politically motivated charges brought against him by the Government. Instead, as Mr. Coloian argued below in the court of appeals,

the district court wrongly applied a standard on the merits of Mr. Coloian's expungement claim that emerged from cases addressing expungement in the context of requests by convicted criminals. *Compare* Pet. App. 33a-34a, *with id.* at 17a-18a (arguing that "[t]he hardship alleged by Mr. Coloian is the stigma that attached to him and it[]s interference with his law practice and business," from having been indicted for a "crime of dishonesty" based on ultimately incredible testimony in a politically charged prosecution). Other cases involving criminal defendants who have been acquitted have included an expungement remedy in similarly extraordinary circumstances. *See, e.g.*, *Diamond v. United States*, 649 F.2d 496, 496-99 (7th Cir. 1981); *United States v. Johnson*, 714 F. Supp. 522, 524-25 (M.D. Fla. 1989); *United States v. Kalish*, 271 F. Supp. 968, 970 (D.P.R. 1967) *cf. Doe v. Immigration & Customs Enforcement*, No. M-54, 2004 WL 1469464 (S.D.N.Y. June 29, 2004), *reconsideration granted on other grounds*, 2006 WL 1294440 (S.D.N.Y. May 10, 2006). The court of appeals never addressed the merits of Mr. Coloian's claims, however, because, on the question presented by this petition, the court held that it lacked the power to reach the merits.

This threshold jurisdictional question of whether a court even has the power to grant a motion for expungement—not whether Mr. Coloian's particular motion should have been granted—is what is now presented for this Court's review. The Government conflates the merits of Mr. Coloian's particular claims with a court's jurisdiction to hear them. It makes a conclusory argument that, under *Kokkonen*, the first and second "heads" of ancillary jurisdiction have not been met here because (i) issues concerning Mr. Coloian's reputation are not sufficiently "factually interdependent" with his underlying criminal case, and (ii) the district court did not "find the government's initiation or conduct of the prosecution to be unlawful." Opp. 10-11. But a district court either has jurisdiction over a motion to expunge judicial records or it does not. The jurisdictional inquiry

should not turn on whether, as the Government frames the issue, the motion for expungement should be granted in the particular case at hand.

The proper way to frame the jurisdictional inquiry under the framework set out in *Kokkonen* is not whether all of the facts and circumstances of *Mr. Coloian's* request for expungement are inextricably intertwined with his underlying case, but whether, as a more generally applicable rule, a motion to expunge judicial records of criminal proceedings is sufficiently interrelated to the underlying proceeding. Similarly, the jurisdictional question under the second "head" of ancillary jurisdiction identified in *Kokkonen* should be whether a court should have the power to manage its own records to "enable [it] to function successfully," *Kokkonen*, 511 U.S. at 380—which it plainly should—not whether in any particular case the prosecutor has acted unlawfully and the court should therefore expunge its records, as the Government suggests. In all events, as the petition showed (at 18-21) without meaningful response from the Government, Mr. Coloian's claims for expungement are in fact intertwined with his underlying criminal proceedings since they are based, in part, upon the profound irregularities that marked those proceedings, and thus it is plain that the court here requires the power to expunge as a possible remedy for the harm that Mr. Coloian has suffered.

This Court's immediate review is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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